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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 167 51596 Office: CALIFORNIA SERVICE CENTER Date: JAN 04 2

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved for a period of 27 days.

The petitioner is a public school district that seeks to extend its authorization to employ the beneficiary as a bilingual teacher from August 23, 2008 to March 26, 2009.¹ The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition without issuing a request for additional evidence (RFE) because the beneficiary had already been employed in the United States in “H” or “L” status for six years since August 24, 2002.

On appeal, counsel asserts that the beneficiary is entitled to recapture at least 214 days he spent outside the United States during the validity of his H-1B petition.²

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B, with counsel's brief and additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

Section 101(a)(13)(A) of the Act states that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.” The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coulitce*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005) as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. The petitioner must submit supporting documentary evidence to meet his burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

¹ The petitioner miscalculated the total number of days that the beneficiary is alleged to have been absent from the United States. If 214 days of absence from the United States were documented, this would mean the petitioner should have requested an expiration date of March 25, 2009. However, the petitioner also miscalculated the number of days the beneficiary is alleged to have been absent as discussed *infra*.

² See Footnote 1, *supra*.

In support of the petition, the petitioner submitted a chart pertaining to the beneficiary's physical presence outside the United States. The days requested for recapture are as follows:³

- December 20, 2002 to January 4, 2003 = 14 days;
- June 14, 2003 to July 23, 2003 = 38 days;
- July 6, 2004 to August 18, 2004 = 42 days;
- December 21, 2004 to January 4, 2005 = 13 days;
- March 26, 2005 to April 2, 2005 = 6 days;
- June 24, 2005 to August 14, 2005 = 50 days;
- December 21, 2005 to January 2, 2006 = 11 days⁴
- June 19, 2006 to July 18, 2006 = 28 days
- December 18, 2007 to January 4, 2008 = 16 days
- February 29, 2008 to March 2, 2008 = 1 day

The petitioner submitted copies of four of the beneficiary's passport pages with the petition. However, these passport pages covered only the beneficiary's entries to the United States from 2002 to 2005. No documentation evidencing the beneficiary's departure dates from the United States and into another country was provided. Also, no documentation substantiating the beneficiary's travels from 2006 to 2008 was provided.

On September 9, 2008, the director denied the petition without issuing an RFE, finding that the petitioner did not establish that the beneficiary is eligible for an exception to the six-year rule.

On appeal, counsel provides copies of all of the beneficiary's passport pages from two passports. The passport pages indicate each of the beneficiary's entries to the United States listed by the petitioner in the chart submitted with the initial petition as well as a period of absence that occurred after the petition was filed. However, they only indicate three of the beneficiary's departures from the United States into Mexico.

The beneficiary's absences from the United States substantiated by the supporting documentation submitted on appeal are as follows:

- December 21, 2005 to January 2, 2006 = 11 days;
- December 18, 2007 to January 4, 2008 = 16 days; and
- June 8, 2008 to July 19, 2008 = 40 days.

However, the AAO cannot credit the last period of time (June 8, 2008 to July 19, 2008) because this trip occurred after the petition was filed on May 23, 2008, and the AAO shall only consider periods of absence

³ Some of the calculations the petitioner made in the chart on how many days the beneficiary was absent during each period of time were incorrect. See Footnote 1, *supra*. However, the AAO has inserted the correct totals. These periods of time, if substantiated, would actually total 219 days of absence, instead of 214.

⁴ The date in the petitioner's chart indicates the beneficiary left the U.S. on December 20, 2005, but the stamp in his passport indicates he entered Mexico (and thereby presumably left the U.S.) on December 21, 2005.

that occurred before the petition was filed.⁵ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the total time listed above that the AAO will credit to the beneficiary is 27 days.

On appeal, counsel states that the reason why the beneficiary's passport does not indicate all of his arrivals into other countries is because the beneficiary is a Mexican citizen who traveled to Mexico, which usually does not stamp passports of its citizens when entering the country. The AAO acknowledges that Mexico does not usually stamp passports of its citizens when entering. However, this does not mitigate the petitioner's burden of proof in providing supporting documentation evidencing the beneficiary's absences. There are other ways to document physical presence in another country besides entry stamps in a passport, including receipts for purchases or accommodation in that country listing the beneficiary's name, ATM withdrawals by the beneficiary in that country, credit card bills evidencing purchases the beneficiary made in that country, etc.

In view of the foregoing, the record contains insufficient evidence to support counsel's assertion on appeal that the beneficiary is entitled to recapture at least 214 days he spent outside the United States during the validity of his H-1B petition. The total proven number of days the beneficiary spent outside the United States is 27.

The facts support approval of the present petition, but only until September 19, 2008, which incorporates the 27 days of recaptured time substantiated by the petitioner. The petition's request for approval until March 26, 2009 cannot be granted as the additional time requested for recapture from the petition at the time of filing was not substantiated beyond 27 days. The period of the beneficiary's absence from the United States from June 8, 2008 until July 19, 2008 cannot be considered on appeal as it occurred after the H-1B petition was filed. Accordingly, the director shall approve the petition for a period of 27 days, until September 19, 2008.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden to the extent discussed above.

ORDER: The appeal is sustained and the petition approved for a period of 27 days, until September 19, 2008.

⁵ This decision does not prohibit the petitioner from filing an additional petition to recapture this 40 day period that the AAO cannot consider on appeal.